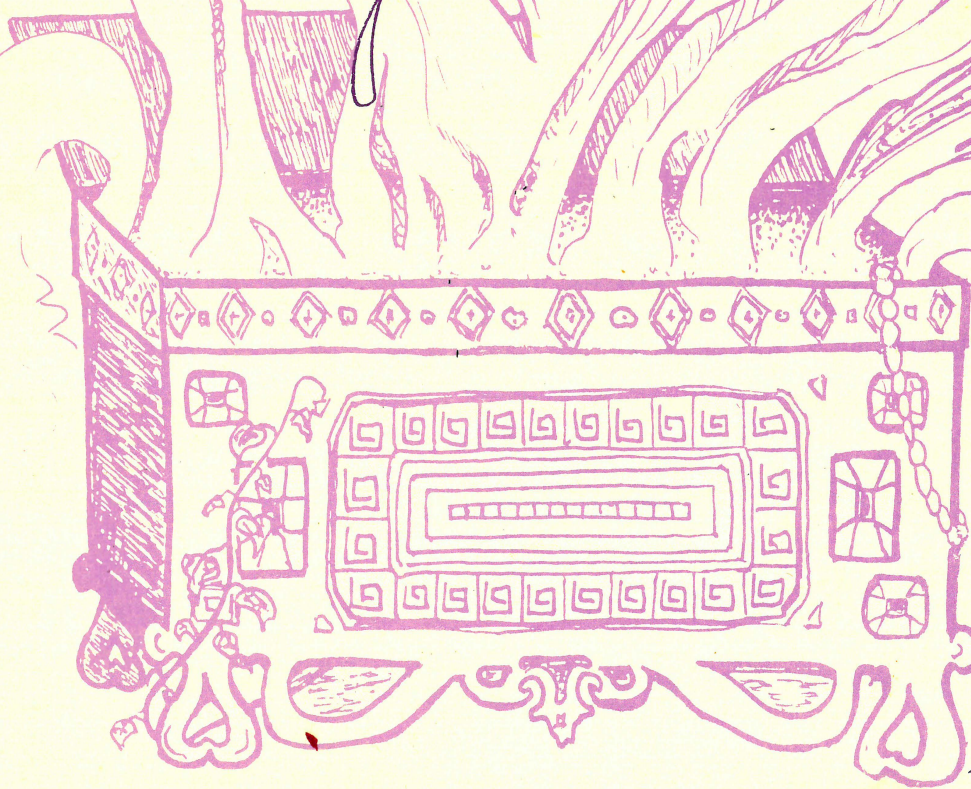


# Pandora's Sept 94 Box



The journal of the \$3  
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## Editorial

I have in the last little while been forced to examine my feminist views, to sift through them one by painful one in an attempt to isolate which ones are mine because my understanding has led me to them, and which ones I had taken on from other feminists because I thought I ought to. Implicit in the context in which the phrase "feminist view" appears above, is the belief that there is a generic meaning in the "f" word. The generic meaning which most appeals to me, is that "feminist" comprehends only that which strives for the *self* actualisation of woman nothing further. Assumptions about the way a woman dresses, or speaks, or votes, or indeed *thinks* may *impede* this goal of self-actualisation. How can I protest the historical silence of women, which is the fountain of so much of our suffering, even as I tell other women to be quiet? Dissent should make a pariah of no woman. It is time to open the boxes into which the female identity has been locked screaming.

Welcome, gentle reader, to *Pandora's Box*. You will be surprised at the assortment of goodies she contains. The personal views of this editor (beyond basic feminist convictions as I've defined them above) should not be apparent from her choice of articles. There are viewpoints expressed in here that I don't agree with hopefully, you'll agree with some of them. Copyright remains with the contributors; italicised introductions are editorial rather than authorial, so they are my interpretation only.

To Margaret Stephenson and Karen Schultz (both of whom are heroes) I owe a great debt (glad it's not monetary; this is a non profit organisation after all) for editorial advice and moral support; apologies to Helen Endre Stacy for purloining her title but she expresses eloquently ideas I've long been struggling with; thanks to my sister Helen for choosing it; and thanks to contributors for making "[e]quality" time in very busy schedules. Especial thank you's to Professor Kathleen Mahoney for her patience I cried tears of blood over every word which space constraints forced me to cut out of her distinguished article; to Judith Lucy whose benefit concert for WATL in February has funded this journal; and to Justyna for help with the typing.

Jacqueline Jago  
Editor



# HATE VILIFICATION LEGISLATION VS FREEDOM OF EXPRESSION WHERE IS THE BALANCE?

*Professor Kathleen E. Mahoney was Visiting Professor in the Faculty of Law at the University of Western Australia until her return to the University of Calgary in August 1994. She is a distinguished jurisprude and constitutional expert. Here she illuminates the tension between the right of free speech and the right to equality, by critical evaluation of the theoretical underpinnings which have been used to justify racial and sexual vilification in the name of a "search for truth" which renders rights to equality meaningless.*

## Introduction

Recently a Committee was struck to advise the Attorney General of Victoria on Racial Vilification. In their investigation, they asked themselves three questions:

- I Is any legislation warranted in current circumstances?
- II Is any legislation justifiable?
- III How broad should legislation be?

In this paper, I have used these same three questions to serve as a framework for my remarks. Firstly, I will argue that criminal legislation prohibiting hate propaganda is warranted because of the harm it causes to individuals and groups, as well as to society as a whole. I deal then with the justification issue whether the harm of hate speech outweighs the harm of limiting it. This is the freedom of expression/freedom from expression section where the traditional arguments put forward by civil libertarians will be critically examined for their ability to address inequality, discrimination and the competing rights of those targeted by hate speech. Thirdly, I look at international responses to hate speech, particularly in light of increasing neo Nazi and neo fascist activities in western democracies. The question of the responsibility of states to prevent the growth of such groups and prohibit hate propaganda will also be discussed. In the concluding section, I look at the emerging right of equality and its relationship to civil liberties and human rights.

## I. Is legislation warranted?

To determine that legislation prohibiting hate propaganda is warranted, governments must be convinced that there is a pressing and substantial need for it, based on rational considerations. I argue that these criteria are met: that the need is the avoidance of harm to individuals, to groups and to society at large.

The proliferation of racist hate messages is rapidly increasing throughout the western world. They are distributed through a variety of low and high technologies. In recent years, racial hatred has evolved from words to action in ways which the Western World has not seen since World War II. In Europe, some political parties overtly promote racist platforms while others thinly veil racism as a necessary part of generally repressive policies. More conspicuous than political parties are the various groups of skinheads, unofficial paramilitary formations and other groups of mainly young people that engage in violent racist attacks. All of this pales in comparison to the genocidal war in the former Yugoslavia, where "ethnic cleansing", fed by hate propaganda, is the euphemism for mass



killings, rape and torture of civilians for the simple reason of their Muslim religion and ethnicity.

Some forms of hate propaganda are more pernicious than others. Holocaust denial is especially pernicious because for survivors of the Holocaust it is the essence of cruelty. It not only denies the harm done to them and belittles the indescribable pain they suffered and suffer it defames the deaths of those who were murdered. Since the close of the Second World War, the entire body of treaties and customary norms which now constitute the international law of human rights are rooted in the belief that the Holocaust marked the epitome of the brutal consequences which flow from unchecked racism. If people can be convinced that the Nazis had no systemic plan of genocide then racism would not be as dangerous as supposed.

In these ways, denial of the Holocaust goes far beyond the Jewish interest. Another particularly pernicious form of hate propaganda is racist pornography, which uses media technology to merge xenophobia with misogyny, with the result that hatred is sexualized and made into a kind of sexually arousing racism. Like other forms of hate propaganda, its purpose is to distort the message of a group or class of people, to deny their humanity and make them objects of ridicule and humiliation such that acts of aggression against them are perceived less seriously. But racist pornography goes further. The permanent record of the abuse reproduced, countless times, to be enjoyed as "entertainment" by misogynist racists, creates unbearable ongoing suffering for those who experience the abuse, their families and the members of their group. Documented evidence exists that this form of hate propaganda was used by Nazis against Jews before and during World War II. Today it is being used in the Balkans<sup>1</sup> war, where videotaped rapes and sexual torture of Bosnian Muslim women by Serbian soldiers have been copied and distributed for use not only amongst soldiers but also for mass civilian consumption<sup>2</sup>. This should not really surprise anyone, as the mass marketing of sexual assault and abuse of women and girls is a multi billion dollar trade in peacetime usually protected by free speech principles.

What must be understood is that whatever form it takes, the purpose and effect of hate propaganda is to lay the foundation for the mistreatment of members of the victimised group. Society as a whole suffers because such expressions undermine freedom and core democratic values by creating discord between groups and an atmosphere conducive to discrimination and violence<sup>3</sup>. Non violent hate speech exists on a continuum which inevitably leads to violence once the weapons of segregation, disparagement and propaganda have done their work. Social psychologist, Gordon Allport's analysis of the continuum effect is convincing in its appeal to common sense and historical experience. He says there are five stages of racial prejudice: expression of prejudicial attitudes, avoidance, discrimination, principal attack and extermination. Each stage is dependent upon and is connected to the preceding one. Allport uses the history of the Third Reich as an example:

It was Hitler's antilocution that led Germans to avoid their Jewish

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<sup>1</sup> Catherine Mackinnon, *Ms Magazine* July/August 1993 24 at 26 27

<sup>2</sup> Ibid.

<sup>3</sup> *R v Keestra* [1990] 2 WWR 1 at 42



neighbours and erstwhile friends...ma[king] it easier to enact the Nuremburg laws of discrimination which in turn, made the subsequent burning of synagogues and street attacks on Jews seem natural. The final step in the macabre progression was the ovens at Auschwitz.<sup>4</sup>

In summary, when approached from a harms based analysis, it is difficult to argue that laws should not be used to protect citizens from hate speech. The most fundamental purpose of any system of law is to protect humanity's basic existence. If it cannot or will not, then it too is likely on the path of extinction.

## II. Can Legislation Prohibiting Hate Speech be Justified in Light of Free Speech Principles?

To begin with, it is universally agreed that all important values in a free and democratic society must be qualified and balanced against other (often competing) values<sup>5</sup> they are not absolute. This process of balancing is as much required with respect to the value of "freedom of speech" as it is with other values, so that when values or rights collide, the process starts with an examination of principles underlying the protection of freedom of expression. These could be summarised as: the quest for truth; the promotion of individual self development and human flourishing; and the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged<sup>6</sup>. The metaphor widely adopted for thinking about the functions of the truth seeking rationale is the marketplace of ideas<sup>7</sup>, where citizens meet as equals, and no idea is suppressed so that wise decisions can be made for the general good based on a hearing of all viewpoints.

The objective of free speech demands, then, that almost all forms of speech be protected; including extremist speech on the periphery of that freedom. If not, the valued speech at the core of the freedom is threatened. Civil libertarians, who are the strongest proponents of the marketplace of ideas approach<sup>8</sup>, believe that the only laws which can be justified are those prohibiting incitement to racial violence in situations of imminent peril. Where there is no "clear and present danger" of violence, limits on speech are not permissible<sup>9</sup>. Some extend this to the point of saying there is no such thing as a false idea that expressions that some races are inferior, or that the Holocaust never happened, must be protected. All ideas deserve a public forum, and the way to combat ideas one does not agree with is through counter expression. A further proposition that civil libertarians rely

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<sup>4</sup> Gordon Allport, The Nature of Prejudice (Addison Wesley, 1954) 14 15

<sup>5</sup> (1987) 38 DLR (412) 161 at 184 per Dickson CJC

<sup>6</sup> *Irwin Toy Ltd v Quebec (A-G)* (1989) ISCR 927 at 976

<sup>7</sup> T. Emerson, "Toward a General theory of the First Amendment", 72 Yale L.J. 877 at 882 883

<sup>8</sup> See A. Bovoroy, When Freedoms Collide: A Case for our Civil Liberties (Toronto: Lester and Orphen Dennys) 1988 at 40 41

<sup>9</sup> *Brandenburg v Ohio* (1969) 395 US 444 at 477

on is the assertion that there is little, if any, tangible harm that can result from the mere expression of words because they are not "acts". Consequently, propaganda and pornography are labelled by them as merely "offensive material", nothing more.

It is my view that many of these arguments are fundamentally flawed. A good number of the assumptions which underlie them can be questioned both on theoretical and practical levels because they are outdated; they ignore harm to target groups; they are gender and class biased; and they overlook or minimise other fundamental democratic values. First, the assumption that a commitment to the democratic system of government requires an unqualified commitment to free speech is problematic. It sets up an either/or proposition which is not only misleading, but has a distinctly eighteenth-century tone. It relies on the proposition that governments are a constant threat to the freedom of citizens<sup>10</sup>, which, in the context of western democracies in the twentieth century, is overplayed, making any attempt to limit the free speech principle almost subversive.

The reality is that speech issues raised by racist and sexist hate propaganda are very different than those that faced fledgling democracies in the seventeenth and eighteenth centuries, and it is hard to imagine how the unhindered, wilful promotion of group hatred could be characterised as either elemental to the structure of democracy, or an advancement in the protection of freedom. Setting up a freedom of expression/democracy equation as an "either/or" proposition makes inquiry into and analysis of the experience of disadvantaged or vulnerable members of society impossible. This explains why few civil libertarians debate or even recognise the harm hate propaganda causes to women or racial and ethnic groups.

Modern democracies that respect equality have accepted as a fundamental principle that legislative protection and government regulation are required to protect the vulnerable. All constitutions in free societies embody this concept by permitting limitations on speech activity if those limitations are justified in the democratic context<sup>11</sup>. A second and related problematic assumption underlying civil libertarian arguments is that hate propaganda laws necessarily put the government in the position of being the singular antagonist infringing an individual's rights. A more accurate characterisation is that racism is a group based activity. Those who promote hatred of a class, are aggressors in a social conflict between unequal groups. By prohibiting the public, wilful promotion of group hatred on the basis of race, religion or ethnicity, or the violent, degrading or dehumanising sexual exploitation of women and children, the government advances the interests of the disadvantaged on the one hand, as against the hatemongers on the other. Thus, it makes more sense to argue that unless hate propagandists can justify limiting the equality rights of minority groups and women, governments can justify limiting their [hate propagandists'] expression<sup>12</sup>.

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<sup>10</sup> Lee C. Bollinger, The Tolerant Society (Oxford University Press, 1986) 79

<sup>11</sup> Section 1 of the Canadian Charter of Rights and Freedoms clearly sets out the balancing concept. It states that the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable prescribed bylaw as can be demonstrably justified in a free and democratic society".

<sup>12</sup> Kathleen Mahoney, The Limits of Liberalism in Canadian Perspectives on Legal Theory Richard Devlin (ed.) (Eamon Montgomery 1991) at 64



A third criticism is the degree to which civil libertarians rely on the truth seeking rationale to defend racist and sexist hate propaganda. The general proposition that open discussion advances the pursuit of truth cannot be questioned; but when speakers deliberately misrepresent the work of historians, misquote witnesses, fabricate evidence and cite non-existent authorities as Holocaust deniers do<sup>13</sup>, their speech is the antithesis of seeking truth through the free exchange of ideas. Similarly, opinions of pornographers which advocate the sexual torture or degradation of women cannot be said to contribute to truth seeking<sup>14</sup>. The content in both examples fundamentally contradicts basic egalitarian principles and values of a free and democratic society.

While it can be argued that these forms of extremist speech may be of value through educating the population about racial hatred and misogyny, it is far from clear that an open confrontation with racist and sexist hate propaganda in the marketplace of ideas leads to a richer belief in the truth. It is more likely that the opposite result occurs. The messages in increasingly accessible pornography<sup>15</sup> which portrays women and children as sex objects available to be violated, coerced and subordinated at the will of men<sup>16</sup> is replicated in real life statistics which are also increasing at a very rapid rate. Widespread sexual assault, wife battery, sexual harassment and sexual abuse of children indicate that the competing idea, that women as human beings are equal to men and that children must be treated with dignity and respect, is not emerging from the marketplace of ideas in any significant way. The value of pornography as a truth seeking device in these terms ranges from remote to none.

In the criminal justice system, speech that is inflammatory or highly emotive may be excluded because of its potential prejudicial effects on the judgment of the judge or jury. In other words, it is recognised that certain forms of speech can undermine the truth. The view that the truth will always win out in a free marketplace of ideas is at best ignorant and naive; at worse, disingenuous and dangerous. Past and present history of sexual, racial, religious and ethnic violence should be the backdrop against which the truth value of hate speech is measured.

A further flaw in the "free market" argument is that it assumes equal, unhindered access where all citizens have the opportunity to communicate and be heard. The reality of today is that modern mass media have altered the whole concept of communication as it was envisioned by nineteenth century liberals who developed the metaphor<sup>17</sup>. The mass media "own" the skills and language techniques necessary to address the people. The marketplace

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<sup>13</sup> See Justice Cory of the Supreme Court of Canada's description of "evidence" in the publication Did Six Million Really Die in *R v Zundel* 95 DLR (4th) 202 at 212 213

<sup>14</sup> *R v Butler* [1992] 1 SCR 432

<sup>15</sup> Report of the Committee on Sexual offences Against Children and Youths, Canadian Dept. of Justice (Bagley ed., 1984)

<sup>16</sup> Canadian Dept. of Justice Special Committee Report on Pornography and Prostitution (1983) at 11

<sup>17</sup> See e.g. John Stuart Mill, "On Liberty" (1859), A. Castell, ed., (1949)

of ideas, if it ever did exist, has long since given way to technological and social change. Advantaged groups possess a disproportionate share of freedom of expression by virtue of their greater share of power and wealth. Civil libertarian philosophy creates false equivalencies which perpetuate and ensure inequality and an unfair distribution of speech rights on the basis of class.

A further proposition which requires some comment is the argument that there is little, if any tangible harm that can result from the mere expression of words, from "offensive material". The "offensive" categorisation wrongly places the harm within the victim's control. It suggests that if the victim is harmed, it is her or his own fault because they could have avoided it by averting their eyes or not listening. This form of victim blaming ignores the essence of discrimination, which is not how members of disadvantaged minorities feel about themselves, but rather how they are viewed by members of the dominant majority. As for the "clear and present danger" test, it is a male norm based, like the self defence doctrine, on a "bar room brawl" model envisioning emotional reactions of male combatants to hate speech<sup>18</sup>. It is highly unlikely that women victims of hate propaganda would ever be provoked to physical violence because of it. Their reaction would more likely be to flee or otherwise disappear. By using such an exclusionary, gender biased test, civil libertarians effectively exclude women from any protection hate speech laws can provide. The test is also inconsistent in the hate propaganda context because it assumes that words are only a prelude to action and cannot be prohibited because they are not "acts" leaving unquestioned other laws which limit speech; such as laws prohibiting bribery, blackmail, treason, conspiracy, forms of verbal harassment, threatening and price fixing. All are prohibitions of forms of speech, and none satisfies the clear and present danger test. From a legal standpoint they are considered to be "acts" consisting solely of words. It seems that as a line drawing device, the action/word distinction is selectively applied.

Finally, the civil libertarian argument against "casting the net too wide" must be addressed: that it is legislatively impossible to draw the distinctions required to avoid suppressing the wrong material. Although exact precision in language is the optimum, imperfection cannot be used to foreclose action. It is a question of balance in every case.

In conclusion on this point, I think it is obvious that the civil libertarian view provides something less than a fully inclusive concept of rights which shows itself to be inherently limited and biased against those who seek social equality with the dominant white, male, elite class. This leads to the conclusion that speech rights *can* justifiably be limited as against equality rights.

### III. International Responses

The international community has committed itself to support the elimination of racism. It recognises that racist hate propaganda is integral to the perpetuation of racism; that it is illegitimate and is properly subject to control under international human rights law. Therefore, the debate is not whether to control hate speech, but how to control it. Under

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<sup>18</sup> It was rejected by Dickson CJC in *Kestra*, supra



the Convention on the Elimination of all forms of Racial Discrimination<sup>19</sup> (which Australia has ratified), states are required to criminalise racial hate messages as well as participation in organisations which promote and incite racial discrimination. Since 1992, Sweden, Austria, Italy, Estonia, Lithuania, Romania, Russia, Switzerland, Hungary and the Netherlands have all embarked on new legal strategies to deal with hate propaganda in an attempt to meet the flood of racist and xenophobic manifestations unprecedented in their countries since the end of World War II. Germany<sup>20</sup> and Canada<sup>21</sup> regulate hate speech through criminal provisions, and in 1990, the Canadian Supreme Court upheld the hate propaganda legislation in *Keestra*.

In that case, one James Keestra, a high school teacher, taught anti-Semitic hate propaganda to his students during school hours, examined them and gave high marks only to those who agreed with his views. After being charged under the hate propaganda provisions, the accused challenged the law on the basis that it violated his constitutionally guaranteed right of freedom of expression<sup>22</sup>.

The case was appealed by both sides through to the Supreme Court of Canada where in a ground breaking decision, the legislation was upheld. The Court focused on the harm caused by hate propaganda to other constitutional rights namely equality as well as the psychological and emotional harm caused to the target group. When the harm of the speech was balanced against the rights of hate mongers to speak it, the court found that hate speech is low value speech which cannot outweigh the interests the legislation protects. Some other interesting aspects of the judgment were the express rejection of the clear and present danger test on the basis that it was incapable of addressing the harms the Court was concerned about, and the analogy drawn between racist hate propaganda and pornography. The latter provided a legal basis to support the constitutional validity of anti pornography laws on the basis of the harms based equality analysis used in the *Keestra* decision.

Many other countries have enacted specific hate propaganda provisions while retaining or adding sections addressed to specific types of malice such as Holocaust denial. I believe not only that all governments *should* act to protect their minorities in this way, but also that they *must*. This is because government inaction in the face of injurious racial vilification implicates the state in the illegal discrimination, adding to the harm which targeted groups suffer. Andrea Dworkin, in her discussion of the US Constitution's First Amendment protection of pornography and its impact on women, writes:

"In the country where I live as a citizen, there is a pornography of the humiliation of women where every single way of humiliating a human being is taken to be a form of sexual pleasure for the viewer and for the victim; where women are covered in filth, including faeces...where women

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<sup>19</sup> 660 UNTS 195, Can TS 1970 No. 28, at 4

<sup>20</sup> See Eric Stein, "History Against Free Speech" (1986) Mich. L. Rev. 277

<sup>21</sup> Criminal Code RSC 1985, c. C 46 S. 181

<sup>22</sup> *R v Keestra* (1984), 19 CCC (3d) 254

are tortured for the sexual pleasure of those who watch and those who do the torture, where women are murdered for the sexual pleasure of murdering women, and this material exists because it is fun, because it is entertainment, because it is a form of pleasure, and there are those who say it is a form of freedom.

Certainly it is freedom for those who do it. Certainly it is freedom for those who use it as entertainment, but we are asked also to believe that it is freedom for those [to] whom it is done...Now that tells me something about what it means to be a woman citizen in this country and the meaning of being second class<sup>23</sup>."

Failure to protect vulnerable groups from hate speech burdens them with a disproportionate cost of speech promotion when they are already disadvantaged. This violates the principle of equality before the law and equal protection of the law. In other words, it is discrimination by failure to act. When pornographers can freely ply their trade in the face of judicial findings that it seriously harms women<sup>24</sup>, and when American Nazis can march with police protection through a suburb of Holocaust survivors, the state promotes or at least condones sexism and racism.

## Conclusion

Throughout this paper I have discussed principles taken from Locke, Hobbes, Rousseau and Mill<sup>25</sup>, and disagree with the way many of them are applied by civil libertarians to the present day context. The commitment to civil liberties, while a good start, is only the beginning. Human rights start where civil liberties end. Human rights go beyond the relationship of the assertive, white, independent, middle class male individual to the state. They invoke the state's intervention and assistance because other kinds of individuals as members of groups are disadvantaged for arbitrary reasons beyond their control.

Equality is an emerging right, and the goal of a more humane and egalitarian society requires new ways of talking and thinking about the problems of free expression lest we find the progressive tools of an earlier era turned against progress. I hope that Canadians and Australians will continue along the path that has been mapped by a few in deciding what limits can be set on a public, wilful promotion of group hatred; limits based on a context driven, harm based equality analysis which I have attempted to provide in this paper. If they do, rights and duties will be allocated equitably, not simply on the basis of doctrinally stagnant grand principles that thwart rather than achieve liberty and substantive equality.

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<sup>23</sup> A. Dworkin, "Pornography is a Civil Rights Issue for Women" (1987 88) 21 Univ. of Michigan Journal of Law Reform 55, 56

<sup>24</sup> *Collin v Smith* 578 F. 2d. 1197 (7th Circ., 1978)

<sup>25</sup> See John Stuart Mill *On Liberty* (1859), A. Castell, ed., (1949); J Rawls, *A Theory of Justice* (Cambridge: Harvard University Press) 1971; J Locke, *Essay Concerning Understanding* (Oxford: Clarendon Press) 1984; J Locke *Two Treaties of Government* (New York: New American Library) 1965

## MABO AND WOMEN'S RIGHTS CUSTOMARY LAWS AND CONTEMPORARY VALUES

*Margaret Stephenson lectures in Law at the University of Queensland and has edited books on controversial subjects: two on the Mabo decision, as well as a book on the republican debate. In this paper, she examines the reasoning behind High Court and legislative attempts to give legal expression to current views of racial equality, and potential difficulties these attempts may encounter where indigenous women's relationship with the land is not recognised by tribal law.*

In the historic decision of *Mabo v Queensland*<sup>1</sup>, the High Court of Australia for the first time since white settlement gave judicial recognition to native title and indigenous people's common law rights to their traditional lands. The contents of these rights were determined in accordance with traditional laws and customs relating to the land. In this article I will give an overview of the *Mabo* case and the Commonwealth native title legislation. I will also look at the laws and customs which inform native title, and how these might be viewed in light of contemporary notions of women's rights.

### 1 . The Mabo Case

In a six to one decision, with Mason CJ, McHugh, Brennan, Dean, Gaudron and Toohey JJ in the majority and Dawson J dissenting, the High Court declared that the common law of Australia recognised a form of native title, being the rights of indigenous inhabitants to their traditional lands in accordance with their laws and customs<sup>2</sup>. This was stated to be subject to the State Government's right validly to extinguish that title; although that right in turn was subject to the *Racial Discrimination Act 1975 (Cth)*.

In reaching its decision, the High Court found that Australia was not *terra nullius* or unoccupied at white settlement in 1788; that native title was recognised by common law; and that the Crown was not the owner of all land as previously thought. Instead, on the acquisition of Sovereignty, the Crown acquired a bare or radical title to the land not complete ownership of it. This title is the foundation of the Crown's fundamental right to govern the country and grant interests in land to its citizens, and to extinguish native title.

### 2. The Native Title legislation

The Commonwealth Government's legislative response was to enact the *Native Title Act 1993 (Cth)* which not only incorporates much of the law in the *Mabo* decision, but also extends it in many respects by providing for recognition and protection of native title; regulation of dealings affecting native title; establishment of a means to deal with native title claims (for example the Tribunal and Court processes); the validation of past Acts if they have been invalidated because of the existence of native title; and a land acquisition fund. It also provides for payment of compensation by either State or Commonwealth

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<sup>1</sup> (1992) 66 ALJR 408

<sup>2</sup> For a detailed discussion of the case see Stephenson M.A. (ed.), Mabo: A Judicial Revolution (Brisbane: University of Queensland Press) 1993.



Government to native title holders for any loss or impairment of their native title a question which the High Court left open.

While this legislation has done much to deal with the legal issues left unresolved by the High Court decision in *Mabo*, there remain several areas that have not been addressed, and in addition there are new challenges raised and further frontiers to bridge under the Native Title legislation. Significantly, the content of native title as defined in relation to traditional rights is still unclear: Section 223 of the Commonwealth Act has not codified or specified exactly what native title involves, defining it, following *Mabo*, as the rights and interests of Aboriginal peoples as derived from traditional laws acknowledged and traditional customs observed. This means that any traditional customs or practices of the native community in relation to women's rights in respect of native title land would be recognised.

The main issue with regard to the content of native title is whether native title is restricted to traditional laws and customs at the time of the Crown's acquisition of sovereignty or whether native title includes not only past uses but also present and future uses of the land. The answer was never clear from the *Mabo* decision. The High Court has accepted that traditional laws and customs may have undergone changes over the years, yet still may be accepted as traditional ways. Thus the content of native title will not be frozen in time at the moment of settlement. However, the issue is how much change is permissible before laws are no longer classified as traditional laws and customs. It is accepted that customs are not immutable; rather that it is in the nature of customs that they change and adapt to new circumstances. Therefore it is arguable that commercial development of traditional lands would be permissible in Australia. It is also arguable that any traditional practices in relation to women and their rights that may not accord with contemporary views may also be modified and adapted and still be recognised as part of native customary law.

### 3. *Mabo* - the impact on Aboriginal Women

It can be seen from the *Mabo* decision and the subsequent legislation that the basis of native title to land is the recognition of traditional laws and customs. These vary greatly from group to group, but in most Aboriginal cultures women were accorded rights to the land. Both sexes used the land for sustenance – the men to hunt, and the women to gather food – however, men were often in charge of the sacred objects that indicated tangible proof of ownership of the land. Men held the “indicia of title” and were often seen to be in control of the political process that dictated land management<sup>3</sup>. Women in some groups were excluded from such processes of decision-making or were consulted only informally. The role women played, the influence they exerted, and the ways women had to make their weight felt is not always apparent because the men were so often seen to be in control politically. In other groups women were acknowledged as the main nurturers of the land and to have the responsibility for the land; or they exercised defined rights of

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<sup>3</sup> For an excellent discussion of land tenure see Williams, M.M. The Yolngu and their Land: A System of Land Tenure and the Fight for its Recognition (Australia: Australian Institute of Aboriginal Studies) 1986 esp chapters 3 & 5. For a classic study of Aboriginal women see Karberry, P.M. Aboriginal Women Sacred and Profane (London: Routledge and Sons) 1939.

ownership over certain regions of tribal territory where they were portrayed as independent and autonomous<sup>4</sup>. Women's rights were also diminished where patrilineal descent was practised; however many clans also practised matrilineal descent which created many levels of responsibility in relation to the "mothers' land". From anthropological evidence it certainly appears that Aboriginal women have had a significant input in the management of tribal land. In South Australia, the significance of women's sacred sites has been highlighted by the 1994 decision of the Federal Government to ban the building of a bridge over an area subject to Aboriginal heritage claims. The bridge would have violated the spiritual belief of Aboriginal women in their ability to reproduce. The full details on which the ban was based were not revealed to the Government, as according to Aboriginal tradition this information cannot be revealed to men<sup>5</sup>.

An interesting question arises where these traditional native laws do not accord women equal recognition of access and rights to land. How will contemporary values react when confronted with the continuation of discriminatory indigenous practices in relation to women? Under the relevant Commonwealth legislation, that is, the *Sex Discrimination Act*, discrimination on the basis of sex is permissible "in relation to a disposal of an estate or interest in land by will or by way of gift", for example where the land is inherited by male heirs only. Traditional Aboriginal law in a particular community may forbid women from making certain land management decisions; or it may vest in the clan's headman the power to decide whether members of other clans have rights of access, or who has rights of inheritance. Would such traditional law be upheld to prevent women becoming members of the body corporate that is entitled to make such decisions in relation to community property under the *Native Title Act 1993 (Cth)*? If so, would the Sex Discrimination legislation be infringed? In Queensland, discriminatory traditional laws may be valid under Section 80 of the *Anti Discrimination Act 1991 (Qld)* which provides that "it is not unlawful to discriminate on the basis of sex...if the discrimination is in accordance with the culture concerned...and is necessary to avoid offending the cultural or religious sensitivities of the people of that culture or religion".

## Conclusion

Justice Brennan found that the common law of this country should not be frozen in age of racial discrimination in relation to land tenure. Women's rights also should not be frozen in an age of discrimination. In finding that the common law recognised native title, *Mabo* added a new dimension to our system of land holding, a scheme in response to current notions of justice and equality. Women's rights should also be accorded these notions of justice and equality, and women's roles in the use and management of native title should be given appropriate recognition and acknowledgment - especially those rights which have been governed by traditional laws relating to indigenous women. Rights of Aboriginal women must be accorded a real role in the new regime of land title in the post-*Mabo* era.

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<sup>4</sup> See Bell, D. *Daughters of the Dreaming* (Australia: Allen and Unwin) 1993; Brock, P *Women, Rites and Sites* (Australia: Allen and Unwin) 1989.

<sup>5</sup> The *Australian*, 12 July 1994, 3. Professor Cheryl Saunders of the University of Melbourne conducted the investigation.

## MAN EMBRACES WOMAN?

*The following article was written by Marianne Jago, a student at the University of Queensland, as part of a non sexist language package compiled by her and Paulette Dupuy, also a student at UQ. The package was written as a WATL initiative and has been distributed to staff at the TC Beirne School of Law.*

Much attention has been focused recently on the generic use of the pronoun "he", and other aspects of English usage which involve gender distinctions or exclusions. This is a topic which has been raised frequently by students, female and male, to the Women And The Law Society, and this document contains our response. It is intended to help persuade those lecturers, students and text writers who remain unconvinced of the discomfort experienced by members of their audiences when language which is gender exclusive or contains belittling stereotypes is used. As one (male) lecturer put it, "teachers who continue to use sexist language do so because they are unaware of the offence they cause, and how easy it is to change habits". We base this essay on that premise.

### 1. Who said 'he' means 'she'?

The notion that "man embraces woman" is a fairly recent one in the history of the English language. It was virtually unknown until the sixteenth century, before which the pronoun "they" was used in the singular as indeed it has been since: "Anyone wanting their essay should see me"<sup>1</sup>. The idea that "he" should be placed before "she" was presented when male grammarians argued that the male gender was the *worthier* gender<sup>2</sup>. Naturally enough, this rationalisation encountered little opposition when it was published to its almost exclusively upper-class male audience. It was not however until 1746 that women were removed altogether from joint references, when John Kirby published his "Eighty Eight Grammatical Rules". Rule Number Twenty One stated that the male gender was more comprehensive than the female gender, so the pronoun "he" would be sufficient when referring to "they" [them]. From here it was a small step toward the concept that male is the universal category, the norm. Rule Twenty One reflects the bias of a dominant group, which was in a position to decree that its prejudices become grammatical norms. Thus it became grammatically clumsy to use language in a way which showed disagreement with the newly defined "truth".

The notion that "he" can be used to include women is flawed for two reasons. It is based on the idea that woman is inferior, less comprehensive, or behind man in the "natural order". It is not my task to persuade the doubting reader of the falsity of this claim. In addition it fails in its intent, generous as we are to find one, to include both sexes. The following examples illustrate that despite the best intentions of the user of the generic "he", "men" is not understood to mean "people". Numerous studies<sup>3</sup> have concluded that generic "man", such as "social man" or "urban man", conjures up images which do not

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<sup>1</sup> Dale Spender, Man Made Language 1990, 148 9

<sup>2</sup> ibid, 147

<sup>3</sup> Schneider and Hacker: 1973, Harrison: 1975, Miller and Swift: 1976



share the gender neutral intention of the description. In other words, even when the speaker or writer intends "he" to mean "they", the image the audience receives is male. This confusion is quite natural considering the ambiguity of a term which stands for both an entire class (people) and a specific subset of it (males). The statement that "man's vital interests are life, food and [in many cases] women" is easily accepted, but "man, being a mammal, breastfeeds his young" sounds absurd<sup>4</sup>. The point of this illustration is to show that women are generally excluded by the generic use of "he". We are told that we are represented by a symbol which half the time does not even apply to us. What are the implications of a society whose language is characterised by the premise that the world is male unless otherwise specified?<sup>5</sup> If male is the norm, is female the aberration?

Another complaint is that the problem lies not with the language but with the oversensitivities of women. If an error in interpretation is repeatedly committed, does it not stand to reason that the message might be garbled? Language is not truth; it reflects not only the opinion of the sender (who may have the noblest of intentions), but it is also laden with connotation. Even if women did not take offence at biased language there are more compelling reasons to stop using it: sexist language reflects attitudes about the role of women in society that are wrong. Women are people, not a variation on a central theme. They are active members of the community and are a growing presence within the established institutions of law 54% of law students are female, and they must be represented in a manner reflective of their presence. For those who continue to believe that women are not entitled to feel affronted by gender exclusive language, consider at least the inaccuracy and inappropriateness of the language you use.

## 2. Language in Lawschool

In keeping with our assumption that it is only a lack of information which keeps members of our law school from addressing this problem, statistics<sup>6</sup> illustrate the stereotypes confronting students in our law school. This not only makes some of them uncomfortable; it also means that those of tomorrow's lawmakers who hold inappropriate attitudes about the role of women in today's society are leaving university with their prejudices intact: "Both Sides of the Problem", a submission compiled last year by the Women And The Law Society at the University of Queensland for the Australian Law Reform Commission enquiry into Equality Before the Law, undertook a gender analysis of the law course at the University, and found that tutorial and exam questions describing hypothetical situations in most law subjects (with some noteworthy exceptions) use the male pronoun if the gender of the character could be either, and when women are represented, they fill traditional roles such as wives, secretaries, rape victims, or models. Until a more realistic representation of women is given, some students will continue to feel affronted, and others will feel justified in holding onto their biases.

Those who resist adopting non sexist language list all sorts of heartfelt reasons why they

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<sup>4</sup> Philip Smith, Language, the Sexes and Society, 1985, 50

<sup>5</sup> Spender, Op. Cit., 146

<sup>6</sup> Jacqueline Jago (ed.) "Both Sides of the Problem": WATL Submission to the Law Reform Commission Enquiry into Equality Before the Law, 1993

are unable to oblige. The one most frequently cited is that it is rather cumbersome and time consuming. This is a valid concern, for it can be difficult to break a habit which is over four hundred years old, and has had the sanction of rules of grammar. However it must be said that any new terminology is clumsy to use at first. No doubt indigenous Australians had great difficulty becoming accustomed to the English which defined them so pejoratively. In one of the prescribed texts for the Equity course, the author in his preface states that his use of "he" as the universal pronoun is not meant to be exclusive of females. This attempt to make us feel included fails because as has been shown, the intent of the writer does not correspond with the image received by the reader. Evans laments the space constraints which do not allow all those "ors". As seasoned users of non sexist language, we admit we would find it cumbersome to have to alter accustomed usage of language, however the offence avoided to over half the population far outweighs minor and transient difficulties of adjustment.

Lawyers are unique in many ways, and our very own lawschool has offered us an excuse for sexist language which is not only novel, but statutorily infallible<sup>7</sup>. Look in the definitions section, dearie! Statutory definitions state that "he" describes persons of either male or female gender. To this I will say only that in the case of *Re Bradwell*<sup>8</sup>, decided on appeal in the US Supreme Court last century, Myra Bradwell was denied admission to the bar because the statutory requirements for "people" seeking admission was held not to include "women". *Inclusio unius, exclusio alterius est?*

Finally, the most covert form of sexism is "Clayton's Sexism" the sexism you practise when you're not being sexist. It is displayed by people who know what sexist language is, but don't think it a serious problem. Although reluctant to be seen as impenitent souls, they reveal their sexism nevertheless by mocking a caricature of the non sexist use of language<sup>9</sup>. For example:

"He's very manly. Oops! Should I say "personly"?"

"The Purchaser should lodge a caveat on his property. (Roll eyes) Or HERS."

"Say a Doctor transfuses her or his patient (ooh aren't I being politically correct!) who is a Jehovah's Witness."

Clayton's sexism, which in my view includes disclaimers such as Evans', is perhaps worse than overtly sexist language, because in many cases it pretends to sympathise with the problem of biased language even as it ridicules it.

There are some encouraging signs however: 1994 marks the introduction of a 30% Feminist Jurisprudence component into the Jurisprudence II course. Revision of course materials, and "mainstream" courses, must be undertaken at a significantly increased rate however, to ensure that legal education at the T C Beirne School of Law keeps pace with the approach to gender issues taken by our counterparts at other universities.

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<sup>7</sup> See Petrina Czislowksi, "Qualitative Analysis of LA104" 1992

<sup>8</sup> *Re Bradwell* 83 US 130, 16 Wall. 130 (1873), and for an Australian version see *Re Edith Haynes* (1904) 6 WALR 209 at 213 214

<sup>9</sup> Miller and Swift, The Handbook of Non Sexist Writing for Writers, Editors and Speakers, 1982

## A HUNDRED YEARS OF SUFFRAGE

*Senator Cheryl Kernot, Leader of the Australian Democrats, talks about the social cost of the under representation of women in the Australian political process.*

There are many reasons why the law does not accurately reflect or justly serve the interests of Australian women. One of those reasons is that our lawmaking processes are dominated by men. There has been a strong focus in the last two or three years on the male domination of the Australian judiciary and the effect of that dominance on legal decision making. Action has been taken to broaden the selection of judges to reflect a greater gender, cultural and ethnic diversity; and there has been support for additional training for judges to make them more aware of gender issues. But it is not just the judicial side of law making which is male dominated: from where I sit, the parliamentary side of the process is equally deficient in its acute shortage of women as legislators. How can women expect to play an important role in making laws and shaping legislation while we continue to be so grossly under represented in Australian parliaments?

In 1994, Australian women are celebrating 100 years of suffrage. It is timely (if depressing) to note that there have been only 59 women elected to Federal Parliament in the 92 years since Federation – not exactly a record worth cheering about. At the present time, there are still only 29 women sitting in Federal Parliament. There is a single woman in Federal Cabinet; there is only one woman in the Opposition Shadow Cabinet. One result of this under representation is that the views, concerns, interests and experiences of Australian women are not accurately reflected within the political and parliamentary processes. When more than 50% of the population can score only 14.5% of the total seats in Australian parliaments, it is clear that women are a very long way from having an equal input into initiating, developing and amending legislation.

I also believe that women do have a "different voice" from men and, while I do not agree with many of the policies or views put forward by women members of other political parties, I believe that the presence of a larger mass of women within the parliament will eventually result in a positive change to both legislative priorities and the political agenda. I do not believe, as some people do, that a greater presence of women in parliament will result in a "nicer" or "more polite" environment or introduce a higher, more ethical standard of behaviour to politics. I do not believe it will necessarily bring a feminist perspective to law making. Women are simply too diverse to pigeonhole in this way, and there are certainly enough current and historical examples to demonstrate that women politicians and leaders are

not necessarily polite, ethical, or feminist. I do believe, however, that women bring a unique perspective to politics and legislating. As Dr Marian Sawer's work has shown, the increase in parliamentary representation for women over the last two decades (from 2% to 13%) has resulted in a significant shift in Australian politics, with issues such as child care, domestic violence, women's health, sexual harassment and single parenthood emerging as critical, high-profile political issues.

The uniqueness of our position arises largely from our position of inequality. That is our common ground. It does not mean that women are expected to hold common views on everything - we have all had different and varied experiences of that inequality, and our individual personal and political choices will reflect that difference. I believe however that the vast majority of Australian women do share one very basic desire: to end women's disadvantage and inequality within Australian society. If that is our goal, then we cannot sit back and rely on men - no matter how sympathetic, aware or well intentioned they might be to achieve it for us. We cannot rely on male politicians to speak on our behalf or to introduce legislation which addresses our concerns. Similarly, we cannot expect a handful of women parliamentarians - despite their best efforts - adequately to represent the full range of views held by Australian women. We do not just need more women in Parliament: we need more women representing a greater variety of interests and backgrounds. We need Aboriginal women, young women, women with families, women from rural areas - and we need to establish both the processes and the support mechanisms to enable those women to enter Parliament.

Gender bias is systemic. It is deeply embedded in our society and eliminating gender bias in the law is not just about changing the attitudes of judges or fixing the faults in our legal system or increasing the numbers of women judges and lawyers. It is also about ensuring that women have equal input at the point where our statutory laws are made and amended. The simple fact is that without the full participation of women in decision making and law making, the political process will be less representative and less effective than it should be and we will make slow progress towards what should be our main goal: an end to the legal, social and political disadvantage of Australian women.



## PANDORA'S BOX

*It is difficult to reduce equality as a feminist goal to a 50/50 equation where women and men are represented in public as well as domestic life in equal proportions. Helen Endre-Stacy<sup>1</sup> looks at feminist problems in accommodating sex related difference, and challenges a displacement of one elitist gender based paradigm by another.*

Everything we do as lawyers is mediated by the legal tradition and by the legal school of thought. To be authentic legal practitioners, we have to establish ourselves via the interiority of the law. It is a significantly different place to the world that lies external to law. By becoming lawyers, we consciously or unconsciously behave as lawyers behave. And for female lawyers, that means entry to a profession where we will be marked by our gender. Law as a discipline and law as a profession is implicated in the construction of female lawyers as, first and foremost, gendered beings.

What is at stake for female law graduates entering a profession where they are so clearly labelled through their gender? Even if we hope that the discourse of liberal equality will ultimately result in a better balance between gendered differences in the legal profession (women in Queensland make up 4% of the pool of practising barristers<sup>2</sup>), what is the significance of being female in a profession that has been crafted out of male experience until as recently as the last 50 years? Will the discourse of equality accommodate the subtle and covert practices of gendered differences?

### 1. Sex-related barriers/sex-related differences

My starting position is the place where women practising law find themselves right now. They are secondary to their male colleagues in income, professional seniority and choice of work. This ranking arises in no small part from the "logic" of gender related identities. For example, maternity renders the female practitioner an "extra" role as parent/homemaker, but paternity does not lead to equivalent assumptions about the male practitioner. This leaves intact the perception, *and thereby the reality*, of the male as the senior decision maker in law firms, and of the female practitioner as less able or less ready to work long hours and mix it with colleagues after work. The likelihood is that the male practitioner is offered that 7 pm brief listed for hearing the next day on the assumption that he (but not she) is expendable at home. Assumptions about work practices that developed without women's participation, at a time when women were excluded from the legal profession, remain intact.

That is the present reality. That reality exists, *despite and with* better statistics of women as judges, senior counsel and principal partners in law firms. Female sex differences are constructing us now. Our sexuality and our maternity (real or potential) frame us at every turn, even as our numbers and seniority in the legal profession increase. Therefore, if our

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<sup>1</sup> Lecturer, Faculty of Law, Queensland University of Technology.

<sup>2</sup> A survey of practising female barristers in Queensland, conducted by the Queensland Bar Association in 1993, indicated that sexual inequality was a significant feature of these practitioners' professional lives. They consider they are subject to subtle and overt sexual discrimination as a ritual of their working lives.

goals are egalitarian, gender inequalities experienced here and now deserve our attention.

It is dangerous, I believe, to leave women lawyers' gender related identities unchallenged. Non foundationalism leads many women to reject the masculine as the standard against which the feminine is measured. Ideas are created, not found. They are situated, not objective, and can change, rather than be timeless. They can be partial rather than absolute. This is not to deny our gendered differences, but to avoid having those differences constrain us as we would choose to be. We must try to dislodge this essentialist<sup>3</sup> frame up of our sex related differences as legal professionals. This need not mean the rejection of standards as an *idea*. Non foundationalism can co exist with the instinct that standards and ethics have a place. It seems to me however that we can only advance the position of women lawyers if we are able to move beyond sex differences as the first or the final word on what we are.

## 2. The political

Secondly, there is the matter of what issues women lawyers might seek to address. It is not clear to me that it is either better or worse to address "big" issues, such as differences in salary and judicial appointment between male and female lawyers; or to address less ambiguous (and more easily implemented) issues, such as dress and language codes. The key point is that *all* issues on the continuum of sex related differences be discussed. The obvious and subtle discipline exerted over female lawyers' attire (both inside and outside court), or the gendered form of legal language is not a *categorically* different issue from the professional promotion difficulties that face women lawyers.

It may seem trivial to focus on the "smaller" issues. Some will call this vexatious feminism; but law in its *juridical* role spills much ink over the permutations of meaning in language and appearance: what is an "employee" or "contract"; what is "consent"? The constituting character of language, and of external appearances in the construction of ourselves when women appear before law as suppliant (defendant, appellant or respondent) is beyond doubt. It is no less vital when women appear before law as legal professionals.

Consider barristers' and judges' court robes. The imagery of court dress projects mastery, autonomy and self control onto legal professionals. Court dramaturgy is (manly) heroic action. Those who lack self control are mastered by those who do not unleash their subjectivity. Those who are masterful (the gendered history of "masterful" needs no explanation to students of employment and contract law) have autonomy. Those who have autonomy have self realisation and thereby, access greatness (status). Even these small issues that we take for granted can be challenged so as to show up the law in its gendered operation.

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<sup>3</sup> Editor's note: Angela P. Harris ("Race and Essentialism in Feminist Legal Theory" in Katharine T. Bartlett and Rosanne Kennedy (eds) Feminist Legal Theory (Boulder: Westview Press) 1991, 235 at 238 defines gender essentialism as an isolation and description women's experience *independently* of race, class, sexual orientation, and other historical realities.

### 3. The argument

Thirdly, there is the question of how women lawyers should construct *themselves* in seeking professional change. It seems to me that seeking gender change in the legal profession in "victim/oppressor" rhetoric simply reinscribes the adversarial positions of a contested legal matter. In the legal matter, one party loses so that the other may win. The rhetoric of emancipation and change runs the risk of denying any value to the present or prior order. It suggests that there is only value in the new or anticipated order. It runs the risk of inverting the binary opposition of (masculinist) oppressor and (feminine) victim. *It reinscribes status on the basis of gender difference.* By definition, then, it is *limited* and static reform, rather than contextual change.

If women lawyers frame their critique about their profession in the rhetoric of victim and oppressor, they are confining themselves (and everyone else) to a single choice – either the oppressors must reform (that is, male colleagues, female colleagues "playing the game", professional bodies), or the oppressors irredeemably lose any ethical standing. "Correctness" shifts from what was, to the new model of reform. Most vitally, it overlooks those instances when the masculine (or masculinist) "oppressors" have *not* been oppressive, and when female legal professionals *have defined themselves* within their professional life.

### 4. Change

Fourthly, it seems likely that change *will* gradually and inevitably occur in the legal profession to allow easier participation for female lawyers, simply through heightened awareness on the part of the profession, the judiciary and law schools. But it will occur more quickly if there is a commitment to change from within the legal profession in Australia. In 1987, the American Bar Association created the Commission on women to develop programmed, policies and products to advance and assist women lawyers and to educate the profession about work and family issues that affect all lawyers. It could serve as a model for a similar body in Australia.

Its range of activities is broad: the Commission examines gender bias in the legal profession through educational programmed and written and video materials. It offers workshops to the profession on sexual harassment within the legal profession. It sponsors a wide and varied range of conferences, and works in a variety of ways to take feminist legal theory out of universities and into the mainstream. It runs advocacy and leadership courses, and offers its library as a resource to the profession. The commission reports to government bodies on the participation and contribution of women lawyers and assists women in taking leadership roles in legal professional groups. It has adopted consciousness raising as a jurisprudential method<sup>4</sup> to its *internal*, professional practice.

Feminism for women lawyers is not a guarantee of a totalisable future/present that

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<sup>4</sup> Mari Matsuda gives this approach a turn to include women outside feminist discourse that is dominated by white, middle class women in "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11(1) *Women's Rights Law Reporter*, Spring, 7 10.

describes equal numbers of women and men at all levels of legal professional activity. Tension, rather than balance, can be a source of political validity<sup>5</sup>. It is inclusive, rather than exclusive, of all (women *and* men) who are practising law now and may practise law in the future. Expectations of tension encourage moves that can have an ethical standing in present reality, a straining for something that is do able now. Not a deferred future/present but a persistent effortfulness for a present/future. A feminism for women legal practitioners that considers the many and incessantly shifting strategic exclusions that arise because of our sex related differences is critique, not complaint. This rhetoric of critique can be the springboard for unidimensional change: changes to the contaminated perceptions<sup>6</sup> of how women "ought" to be situated in the legal profession, and changes to the empirical productions of those perceptions.

There is never a "right" moment to protest in the name of change for women: not when there is an economic recession; not when there is an oversupply of lawyers; not when it seems that some (small) changes are starting to occur (such as small numbers of female judicial appointments); not when other women without professional legal qualifications face such appalling employment discrimination (conveyancing clerks are a good example). The postponement of seeking change for women lawyers rests in part upon the idea that, at some future, deferred time, we will all agree on how change should be brought about, and who should be prioritised in that process of change. The fiction of Pandora's Box<sup>7</sup> is that the she devil will jump out if it is opened. This fiction of woman's sex related difference needs a critical voice.

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<sup>5</sup> This reading of change from human rights talk to social needs talk has been superbly crafted in relation to abortion by Rosalind Petchesky in *Abortion and Woman's Choice*, Verso.

<sup>6</sup> "Penis envy" is an example. It need only be inverted so as to construct male identity on "breast envy" in early male childhood to understand the grip that history has on the construction of female identity. Which is not to reject Freud's insights on the subconscious, but to suggest that we take on those insights by Lacan and then Kristeva and Irigaray which show us the viability of *any* homogeneous description of gender differences.

<sup>7</sup> *Pandora's Box* is the early silent movie that was adapted by Alban Berg for his opera *Lulu*. It is the depiction of the femme fatale/female sexuality as destructive and thus in need of containment and control. In both, the woman is ultimately killed (by Jack the Ripper). In the silent film, her death scream is the ultimate silent scream.



## WOMEN AT THE QUEENSLAND BAR

I have been asked to write about problems women face at the bar and have done so. I am conscious that in this article I generalise about attitudes. One, perhaps unwarranted, generalisation is that women are not interested in football. More seriously, there are many male barristers and solicitors to whom I am very much indebted. What I describe in this article is what I perceive to be the norm; like all good generalisations those contained in this article have many honourable exceptions!

Jean Dalton, Barrister At Law

### SOME GRIM STATISTICS

In 1990 there were 446 members of the Queensland Bar Association; 42 women 9.4%. Presently there are 549 members of the Association; 37 are women 6.7%. Over the last 5 years 13 women have left the bar and 8 have come to the bar.

There are two significant points. First, when numbers at the bar are expanding in an unprecedented fashion, the number of women barristers is not even holding steady it is declining. Secondly, decline in numbers aside, numbers of women at the bar are pitifully small.

Enrolment figures from the University of Queensland show that about 42% of all law graduates in the last 10 years have been women and that a slightly higher percentage have been honours graduates. Figures from QUT over the last 5 years are similar. The disparity between males and females at the bar is too great to be explained away lightly; especially when the only change that has occurred in recent times has been change for the worse. One is led to the overwhelming question:

### WHY IS THIS SO?

Some factors militating against women coming to and staying at the bar can be identified and described relatively easily.

**The availability of money:** Most new barristers need a loan to buy into chambers. Every barrister needs a (flexible!) overdraft. Banks, and their managers, often male, are notoriously less willing to lend to women and, when they do lend, are willing to lend less. Unfortunately the male chauvinist banker is not a myth and not a relic of a less politically correct age. Many come to the bar when they are in their mid to late twenties. At that age a male is someone to be admired and supported as an "ambitious young man". On the other hand, a female is often regarded as a "young girl" likely to get out of her depth if preventative action is not taken (for her own good, of course.)

**The availability of chambers:** Having the right chamber mates is important financially. Expenses are shared. Usually group liabilities are supported by cross guarantees by all members. Work is passed between members of a group. Some groups are comprised of talented and successful barristers. Others are not. In a busy group a new barrister will pick up some of the excess work, pick up some junior briefs, come to the notice of the many solicitors that frequent the group and have competent people on hand

to advise when they encounter difficulties. In other groups a new barrister may languish.

Chambers is important socially too. You need your chamber mates to whinge to when a peculiarly insensitive judge has spent a whole day refusing to see the brilliance of the argument you spent the whole night devising; to have a drink with at the end of the day and to relieve the utter tedium of a dull day's paperwork. With this in mind new barristers spend some time hunting around for what they consider to be the best chambers available. However, the more pertinent point is whether that group wants the new barrister.

Most chamber groups at the bar are all male. Some of these groups would rather stay that way. It is perceived that women are unlikely to prosper at the bar and therefore constitute a financial risk. A woman would destroy the "Boy's Own" atmosphere in chambers how do you go about talking to somebody who hasn't the slightest understanding of the footy?

So women starting at the bar encounter difficulties in entering chambers and may find themselves relegated to the poorer groups at the bar.

**The availability of work:** Predominantly solicitors senior enough to be in charge of big, interesting and remunerative matters and to have sufficient authority to brief a barrister are male. The percentage of women partners in Brisbane's bigger law firms is not much higher than the percentage of women at the bar. I suspect that while some senior solicitors feel quite comfortable about employing women as their subordinates, they feel uncomfortable about engaging a woman barrister to work as their equal. Still others would just never think of briefing a woman they simply do not think of her in a capable, professional role.

Whenever a new barrister comes to the bar there will be solicitors who have pre conceptions about that person rational or irrational and will never send them a brief. Others will send one or two briefs, decide that the barrister is not for them on rational or irrational grounds and never send another brief. All barristers are subject to this. What is unfair is that there is a significant percentage of solicitors who will never even try briefing a barrister just because she is a woman.

**The type of work available:** Distinct from the problem of attracting any work at all is the problem of attracting work of a particular type. Many stereotype women as family lawyers (women are good at that sort of thing). Women find it next to impossible to get criminal work at the private bar (wouldn't want to involve a woman in that sort of thing). Women are not considered suitable to take cases involving disputes over machinery or involving complicated engineering (women don't understand that sort of thing).

Some solicitors regard women as suitable to perform paperwork (often tedious and unremunerative) but not to go to court on combative matters, say, to get a mareva injunction (interesting and remunerative).

The consequence is twofold: women miss out on much of the interesting and remunerative work available and solicitors and their clients miss out on some very talented advocates because women *are* good at that sort of thing!

**Rainmaking:** Much of a barrister's success in attracting work depends upon friendly

relations cultivated with solicitors. In this social/business role, women at the bar experience problems too. It is relatively easy for a male barrister to ask a male solicitor to have a beer at the end of a day in court. Similarly to go to lunch or dinner. Importantly, he is able to do this with new solicitors who have briefed him for the first time. Women feel uncomfortable about doing the same thing. Their invitations are liable to be misinterpreted.

There is another problem. T Graham in an article, "Women Rainmakers Today", *Law Marketing Exchange*, January 1994, 1, cites researchers Bradstreet, Todhunter and Turitz as having documented women's reluctance to push themselves forward in professional relationships "Men describe their experience and that of their firms expansively and enthusiastically; women are modest and uncomfortable with what they view as bragging" p 4.

**The Baby Myth:** There is a perception abroad that at some stage every woman will drop her career midstream and devote herself exclusively to the business of reproduction and lactating. Childbirth and rearing are serious issues confronting all working women. They should not be overemphasised. There are several senior and successful women barristers in Queensland who have raised their children while working at the bar. In many ways working as a barrister is a distinct advantage hours are flexible and the working day can be re arranged to suit commitments to children.

My own impressions are that women do not want to abandon their careers because they also want to have children. I am fortified in this by the results of an extensive survey of the English bar which found that most women and men who leave the bar do so early in their first three years and for economic reasons ("Without Prejudice? Sex Equality at the bare and in the Judiciary", The General Council of the Bar, November 1992, 13). What can be damaging to a woman's practice is the notion that she will be half hearted about her career because she has had, or is intending to have children. This notion is simply untrue.

## CONFRONTING THE DOMINANT PARADIGM

All the issues canvassed above, are, as I say, relatively easy to identify and describe. I believe that none is as important as the more amorphous group of issues which arise from women entering a profession where we must act in a workplace shaped, controlled and peopled by men.

Professor Rebecca Bailey Harris in her article, "Gender Bias in the Law and the Legal System", *Reform*, December 1993, Issue no 66, writes, "[t]he inescapable historical fact is that within our legal system laws have been formulated, applied and interpreted predominantly by males, whether in the corridors of the parliaments, courts, tribunals or other corridors of power." p 19.

It can sometimes be overwhelming.

There is a plethora of confidence sapping experiences which women encounter which cannot be conveniently grouped. I recall vividly walking into the auditorium of the city hall to attend my first Annual Bar Dinner. I was confronted by 150 male barristers in

dinner suits doing what they do best talking loudly. Their voices reverberated noisily in the high ceilinged room. I also recall well the first time I became conscious that I was the only woman (barrister, solicitor client or clerk) in a crowded chamber courtroom. Neither was a warm fuzzy experience!

Chances are that as a woman at the bar you will sometimes encounter resistance, subtle abuse and exclusion from your fellow barristers. You will sometimes be patronised in court. You won't have another female barrister to discuss the day's events with when you get back to chambers after a day in court. You will have few role models. You will have to ensure business lunches at which the footy is discussed interminably. Hopefully you will persist.

## CHANGE

It is easy to identify problems facing women at the bar and difficult to suggest practical, constructive solutions. However, it is a major step just to recognise that the problems exist. Some women do not. They say, "I have never encountered discrimination in all my long years...". I do not believe them. I suspect that they are reacting to the dominant paradigm. Men feel threatened by women who confront "feminist" issues. One answer is to bat the eyelids, deny any problems exist and thus be as non threatening as possible.

Women in the legal profession need to realise that they do confront special problems just by virtue of their sex. We need to meet and discuss the problems. We need to support each other and stop the erosion of confidence that diminishes us. We need to encourage those women who are up and coming in the profession.

Women's problems are beginning to be recognised formally. This was one aspect of a recent enquiry by the Australian Law Reform Commission into equality before the law. The English Bar Council has made a detailed survey of sexual equality at the bar. Our own Bar Association has undertaken a survey of women's attitudes and has established a working panel looking at issues of sexual inequality at the bar.

The problems women experience at the bar are largely informal and attitudinal in their nature rather than the result of any particular rules or formal barriers to entry. They will, accordingly, be solved informally and in a piecemeal fashion. I hope that more young women will have the confidence to come to the bar. To borrow a rather cliched, and I fear, American phrase, things won't start to change until they start to change...

# ENTERPRISE BARGAINING - LATITUDE OR SERVITUDE?

*Recent changes to Industrial Relations legislation have seen the introduction of enterprise agreements, which exclude union representatives from the wage negotiation process. Patricia Staunton, President of the Australian Nurses' Federation, and Barrister in the High Court of Australia, argues that this process disadvantages women for its failure to take into account their relatively weaker bargaining position.*

Enterprise bargaining represents the final step in the process of decentralising and deregulating Australia's labour market. In doing so it seeks to move from the centralised and regulated industrial relations system that has served this country since Federation. The social and industrial consequences which such a dramatic change of direction will bring, especially for women, require understanding of what is meant by enterprise bargaining and its likely outcomes.

Simply put, enterprise bargaining moves away from a national outcomes approach in wage fixation, to focus instead on the enterprise. The enterprise is a particular business, undertaking or project. The argument is that it is the success or failure of the enterprise (the productivity and/or profitability of the enterprise), that will determine increases in wages and improvements in conditions of employment and career opportunities.

At first glance, such a proposition would be difficult to argue against. It is, after all, a proposition that generally determines wage outcomes in all other OECD countries. 'Why all the fuss?' some observers may well ask. To answer that question, and to put the debate about enterprise bargaining into its current context in Australia, it is necessary first to comment briefly on the history of wage determination in Australia since Federation.

Since the beginning of this century, Australia has approached the general determination of wages and conditions in the employment contract from a centralised national perspective. There has been in place a formal industrial tribunal (the Federal Commission) which at the national level was charged with the task of determining overall national wage outcomes via a process known as the National Wage Case. In making its determination the Federal Commission was required, in accordance with its statutorily defined responsibilities, to determine matters before it according to equity, good conscience and their substantive merits. Powerful principles indeed in the wage fixing arena!

A decision of the Federal Commission in respect of National Wage Cases then flowed to all workers across Australia through the mechanism of industrial awards covering employees across all industries. This process may have seemed puzzling to international observers from



countries whose industrial relations systems have long been deregulated and decentralised, however it is important to note that it was underpinned by principles that can not lightly be cast aside – those outlined above of equity and fairness.

One of the major premises of National Wage Case decisions is that the benefits of increases in productivity should be distributed on a national rather than an industry or enterprise basis. In hearing the 1991 National Wage Case, the Federal Commission had no doubt that the “inevitable consequence” of departing from this long established premise would be that wage increases would vary from enterprise to enterprise<sup>1</sup>. The potential inequities of such an outcome have been recognised since they were debated in 1966 before the Federal Commission in the *General Motors Holden*<sup>2</sup> case, which was then followed in 1970 in a case which concerned the wage rates of metal trade workers who were employed by oil companies. It was claimed on their behalf that there should be increases awarded in rates of pay based on several factors, including the profitability or capacity of the oil companies. The Federal Commission declined this submission and, in affirming its earlier decision in the *General Motors Holden* case, said:

“The major concept upon which the *GMH Case* and subsequent National Wage Cases rested was that increased prosperity should be shared amongst employees generally and not be confined to employees in more prosperous industries. This is not a new concept in arbitration in this country which is and always has been based, broadly speaking, on egalitarianism.”<sup>3</sup>

These considerations of equity and fairness in wage outcomes are a feature of an orderly centralised industrial relations system, and have, in my view, made Australia’s wage fixing system remarkable in an age where individual needs and wants so often take precedence over collective community and social concerns. The present move to enterprise bargaining is supported to varying degrees by all interested parties to the wage fixing debate. What still is at issue, and is at the very heart of concerns raised in the move to enterprise bargaining, is the ability to impose equity and fairness principles on to enterprise bargaining, and to what extent, if at all, a centralised framework should remain in place for the protection of minimum employment standards and groups in the workforce who cannot bargain equitably at the enterprise level.

The concerns expressed in relation to a decentralised system include the application of equity and fairness considerations (particularly for less well placed sectors of the workforce in terms of bargaining capacity), and the overlapping concerns of women workers under a decentralised system (see table 1). Even allowing for the difficulties inherent in direct

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<sup>1</sup> National Wage Case April 1991: print J7400 p 40.

<sup>2</sup> (1966) 115 CAR 931

<sup>3</sup> 1970 (134) CAR 159 at 166.

comparability Australia's male/female gender earnings ratio is better than most largely due to the centralised system and the equity and fairness principles. Studies undertaken at the Victoria University of Wellington into the effects of the deregulation of the New Zealand labour market in 1990/91 are emphatic on the issue of adverse wage outcomes for women workers in a decentralised system:

"Men have on average done very much better than women workers, with men achieving wage increases nearly half a percentage larger than their women counterparts. In addition, contracts where wages have increased by more than 4% cover "mainly men" so the recipients of the larger wage increases that may have resulted from the collapse of traditional relativities and the comparative wage justice system have been men not women. Men have done demonstrably better than women in terms of wage settlements."<sup>4</sup>

There are genuine concerns to be addressed in the move to enterprise bargaining: foremost, its failure to accommodate women's weaker bargaining position in the workplace. Admittedly, advocates of the Darwinian theory of survival of the fittest would not necessarily see the importance of such an accommodation however, in this century we concern ourselves, as does a centralised regulated wages system, with equity, not evolution.

Table 1: INTERNATIONAL COMPARISON  
of women's to men's earnings expressed as a percentage<sup>5</sup>

	1974	1976	1978	1980	1982	1984	1986
AUSTRALIA	74.7	80.9	81.0	80.8	78.6	81.2	81.7
CANADA	59.3	60.2	62.1	63.3	64	65.5	
JAPAN		58.2	58.2	56.7	56.2	55.3	
NEW ZEALAND	74.0	78.7	78.8	78.3	79.0	79.4	
PORTUGAL					72.6	73.1	
GREAT BRITAIN		73	72	72	72	73	74
UNITED STATES				63.9	66.5	69.9	70.3

OECD Employment Outlook September 1988

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<sup>4</sup> The Impact of the Employment Contracts Act on Women at Work, S. Hammond, R. Harbridge, Industrial Relations Centre, Victoria University of Wellington, Working Paper 1/93, ISSN 0113 1788.

<sup>5</sup> Table data vary by basis of measurement (hourly, weekly, monthly etc.) and inclusion of overtime, and cannot be treated as comparable.

## feminism - you know you're soaking in it?

It has been a technique particularly favoured by the media to claim the 1990's constitute a "post feminist" era (whatever that is!). However, as the slogan goes, we'll be post-feminists in a post-patriarchy; a time which certainly hasn't materialised yet. In a continuing attempt to discredit feminism as a political philosophy, and feminists as ball-breaking manhaters, conservative forces have conveniently blamed both for all manner of social evils, such as destroying the family, crippling education and the economy, and even promoting rape (work that one out). To top it all off, feminism contributes to the disturbing proliferation of women who fundamentally believe in equal rights for women, yet always preface their remarks with, "I'm not a feminist, but..."

As observers of this, and as self disclosed unfashionable feminists, we can only assume that feminism is A. dead B. slightly less preferable to nuclear warfare or C. an incredibly powerful social force which happens to frighten the conservative media, politicians, and misogynists of both sexes.. We believe option C. because, statistically speaking, the need for feminist activity and organisation has by no means been eradicated.

Women in the 60s and 70s fought for the fundamental human rights traditionally denied women the right to work for equal pay, to control fertility and express sexuality, to access diverse education: basically, the right to make their own decisions about their own lives, in a society which recognises and values women's contributions and experiences. Anyone who denies the efforts of women in the last three decades exhibits a disturbing lack of historical analysis, and would seem blissfully unaware of the extent of work done by these women.

It is undeniable that many women still face many forms of direct and indirect discrimination. In an Australian context, women still earn an average of 66% of men's wages (female university graduates earn 80% of male graduates' wages), and are one of the most severely disadvantaged sections of the student community when governments implement regressive education policies and practices. We are still vulnerable to rape, sexual harassment and domestic violence in our homes, workplaces and on the streets. Indigenous women and Non English speaking women still suffer the additional burden of the racism endemic in Australian culture. We are still denied the right to control our own fertility, while reproductive technologies are manipulated beyond our reach in the name of research and industry. In addition to the widespread backlash, we are offered gift-wrapped prejudice these days: it certainly hasn't crawled back under the rock it came from.

So now that we've outlined all the reasons why women still need feminist organisation and action, let us tell you where you can find it!

Children By Choice: 237 Lutwyche Rd Windsor Ph 357 5377

Aboriginal and TSI Corporation (QEA) for Legal Services Level 3, 30 Herschel St  
Brisbane Ph: 221 1448

Migrant Resource Centre: 126 Boundary Rd West End Ph: 844 8144

Women's Legal Service: 30 Thomas St West End Ph: 846 2066

Women Lawyers' Association, C/- Qld Law Society: 179 Ann St Ph: 233 5888

Women's Area, University of Qld, St Lucia Ph: 377 2200

## DOMESTIC VIOLENCE AND THE LEGAL RESPONSE

*Jill Uhr is a counsellor at Centacare, a Multi Service Agency which offers Marriage and Family Guidance Counselling. She has a degree in Social Work from the University of Queensland.*

Domestic Violence describes a situation where one partner is using violent and intimidating behaviour in order to control and dominate the other partner . In 95% 97% of cases the abusive partner is male<sup>1</sup>, and violence occurs in one out of every five Queensland homes. In the twelve months prior to the 1991 Queensland Crime Victims Survey, 28 000 women (3% of all women in Queensland) were assaulted. 72% of these assaults were perpetrated by men, and 38% occurred in the woman's home. A further 28% occurred in the home of a friend, relative or neighbour, or at the victim's place of employment. 73% of spousal murder victims are women. Well over 20 000 protection orders have been issued against men since the proclamation of *Domestic Violence (Family Protection) Act (Qld)* in August 1989. These are the statistics. What follows is a brief summary of the legislative response to them.

Jocelynn Scutt remarks that "upon marriage husband and wife were one and that one was the husband". The common law's failure to protect women and children from violence inflicted on them by the *pater familias* should in theory be redressed by the Queensland Criminal Code; however it is rarely used to charge offenders. The main reasons relate to lack of clarity under the common law with respect to police powers of entry to premises where they suspect that domestic violence may have occurred; and to police inability to arrest offenders unless they have witnessed the assault. Allied to these reasons is the lack of clarity about compellability of spouses to give evidence against their partners in cases of domestic violence although Subsection 8(5) of the *Evidence Act* allows it, police often fail to proceed on this basis.

The *Peace and Good Behaviour Act 1982 (Qld)* is little known, and infrequently used in cases of domestic violence. Firstly, the Act does not cover a sufficient range of behaviours detrimental to the victim; and secondly, it requires the victim or her solicitor to initiate action. This is impractical in many instances due to the hopelessness and emotional bonding which

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<sup>1</sup> For this reason, gender specific language has been retained throughout this article (ed.)

domestic violence tends to instil in female victims. Thirdly, the Act does not give police sufficient powers to investigate or to prosecute without the woman's consent.

On a Commonwealth level, the *Family Law Act 1975 (Cth)* allows for quick action if the plaintiff can show need. Problems arise, however, over how it interfaces with state legislation on domestic violence; and because of the conflict between domestic violence and the Act's emphasis on the need to preserve and protect the institution of marriage.

The *Domestic Violence (Family Protection) Act 1989 (Qld)* gives a broader definition of domestic violence: it now includes de facto relationships; makes police investigation and response mandatory if they reasonably suspect a person has been aggrieved; gives police the power of entry and search; allows police to detain a violent spouse for up to four hours; makes a breach of a protection order a criminal offence; allows application for an order by the aggrieved person or a person authorised in writing by the aggrieved person, or an investigating officer of the court; conditions can be attached to orders, and they can be revoked or varied.

Problems became apparent in the implementation of the Act for the following reasons:

- \* It did not fully allow for the fear of retribution, and the isolation, guilt and shame experienced by victims of prolonged abuse
- \* "no contact" orders are often impractical because of the need for house payments, bills, child access and family business conducted from home
- \* Serving orders was difficult if the respondent refused to give his name and address
- \* The shortage of police patrols at night when the majority of violence is reported
- \* Societal attitudes also affect the police (high incidence of abuse in service and police families) and magistrates
- \* Contacting magistrates to sign orders at night, on weekends and holidays is difficult
- \* The Act did not cover homosexual or dating relationships, abusive teenagers or abuse of the elderly
- \* It did not cover harassment and stalking<sup>2</sup>.

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<sup>2</sup> Editor's note: the 1993 amendments to the Queensland Criminal Code introduced stalking as a criminal offence the definition of offensive acts thereunder is broad, and a previously existing marital or conjugal nexus is not an element. In theory, this legislation is quite effective, but the problem of police enforcement remains.

Amendments to the Act in 1992 sought to remove some of these problems. The Act now protects relatives and associates of the aggrieved spouse within the terms of a protection order taken out in favour of the aggrieved spouse. Magistrates can now make conditional protection orders. The requirement in every protection order that the respondent be of good behaviour and not commit domestic violence, and automatic prohibition of any firearms or other dangerous weapons ( or licences thereto) for the duration of the order, establish a minimum level of protection for all aggrieved persons. Temporary protection orders can be issued quickly. The court must explain the proposed order to the respondent when he appears before the court. The amended Act extends the duration of the order to a maximum of two years, or longer where special conditions apply, and a Justice of the Peace may now issue a summons. Police may take a respondent into custody at any place if there is reasonable suspicion on the part of a police officer that an aggrieved person is in danger of personal injury. They can also require names and addresses of persons they reasonably believe to have committed an act of domestic violence, for the purpose of proceeding with an application, and police officers attending a scene where a domestic violence offender is breaching the conditions of an order no longer have to caution first. Orders are now "portable" and enforceable in all states and territories without further court hearings, and hearings of an application for a protection order are now held in closed courts.

Ongoing problems that have not been addressed by the amendments to the *Domestic Violence (Family Protection) Act* are those which arise over access arrangements for abusive parents there are no facilities for supervised access visits. The lack of emergency accommodation for men often forces women and children to leave their home when the family would be better served and the responsibility would rest where it belongs if the perpetrator were the one who had to leave. The privacy of women in hiding from abusive partners is still difficult to maintain many abusive men are excellent con men when it comes to eliciting confidential information from naive clerks. The abuser must still breach his protection order before he can be arrested this is often too late as the spousal murder statistics attest. Many women continue to feel safer staying with the abuser, where they can monitor his state of mind, than in leaving and living with the fear of being attacked at any time.



## COMMUNITY LEGAL CENTRES IN QUEENSLAND

*Tony Woodyatt, Coordinator of the Caxton Legal Centre, talks about Community Legal Centres what they do, why they aren't the same as Legal Aid , and how you can get involved.*

The first Community Legal Centre was established in Victoria in 1972. Caxton Legal Centre, the first in Queensland, commenced operating from an old hall in Caxton Street, Petrie Terrace in August 1976. There are now over 120 Community Legal Centres Australia wide, and 22 in Queensland. Some have grown to fully funded centres with up to 10 staff, while others still operate as part time volunteer services.

Community Legal Centres developed in response to a perception that the established private legal profession was not able to address problems of poverty, equity, justice and discrimination. The Centres arose at the same time as the Whitlam government expanded Federal legal aid to replace the small legal aid services provided by local law societies. In contrast to Community Legal Centres, Legal Aid Offices channel public monies to the private profession, and to in house lawyers to undertake legal cases for clients who are otherwise unable to obtain private representation. As the well of money has dried, Legal Aid Offices have restricted their means and merit tests guidelines.

The approach of CLCs is to try to solve legal problems in their broader social context using different legal strategies such as test cases, community legal education, or law reform. They try to prevent problems from arising; or locate the root cause of a problem, for the benefit not just of one client, but of a group of clients or the community at large.

Caxton Legal Service is a generalist Centre: its volunteer advisers provide advice to all clients who attend its three evening volunteer advice sessions per week. There are other full time generalist centres at the Toowoomba, Roma, Cairns and Townsville Legal Services; and part time centres at Nundah, Petrie, the Gold Coast, Inala Bayside and Logan. All the other centres in Queensland are specialist: they provide specific advice in a particular area of law or in relation to a particular group of clients. The Women's Legal Service for example gives advice only to women in a range of legal issues that affect women. South Brisbane Immigration and Community Legal Service Specialises in immigration law. Other specialist centres are the Prisoners' Legal Service, Welfare Rights Centre, Environmental Defender's Office, Financial Counselling Service, Arts Law Centre, and Logan Youth Legal service. Queensland Advocacy Inc is a specialist legal service for persons with physical disabilities.

Community Legal Centres harness the energies of lawyers, social workers, psychologists, secretaries, administrators and educators by providing direct advice and assistance to clients, or by sharing their skills, experience and expertise with persons in need of assistance. Centres aim to inform people about, and demystify the law. Recent government reports have identified the cost effective nature of community legal centres; yet funding remains insufficient to meet community demand. For this reason, we encourage students and practitioners in law and social work to become involved with the Centre. This benefits clients, as well as providing volunteers with practical experience not usually found in the private profession. Our address is 28 Heal St, NEW FARM QLD 4005 Ph. 07) 254 1811 or Fax 07) 254 1356.

# women and the law

WATL was founded by a group of women law students at the University of Queensland in 1993 on the crest of a wave of media interest in judicial bias against women (does "rougher than usual handling" ring a bell?). It was all a bit scary at first we had no idea how much interest would be shown by other law students, or whether their reaction (if there was one) would be positive. Neither did we have a clue whether the law school would welcome us with open arms, or whether we'd be asked more or less politely to take our fringe festival elsewhere. A year and a half later, WATL members are patting themselves on the back. In August 1993, our provisional affiliation meeting attracted 60 people; women and men, staff and students; spurred on by this, we successfully lobbied the University of Queensland Law Society to have an Equal Opportunities position created on its Executive.

In September, our first function, the Women's Legal Breakfast, was attended by 130 students and 60 professionals. The breakfast was chaired by Her Excellency the Governor of Queensland, attended by the Minister for Aboriginal Affairs and Family Services and the Dean of the UQ Law School; and the speakers included a District Court judge, a Family Court lawyer, and a law student. In October we posted a 10 000 word submission to the Australian Law Reform Commission's enquiry into Equality Before the Law, entitled "Both Sides of the Problem", and to which 12 women contributed. This was a gender analysis of the law course at the University of Queensland, and preceded the introduction in 1994 of a 30% Feminist Jurisprudence component in the Jurisprudence II course. Between these events, we also squeezed in lunchtime seminars on (inter alia sorry, can't resist that Latin) domestic violence law, the Women's Legal service's gender analysis of the Criminal Code; and some of us found the time to hear Canadian Professor Kathleen Mahoney, who is an international expert on constitutional and women's legal issues, speak on gender bias in the judiciary.

February saw the release of Themis, our Newsletter; and 1994 has brought with it the first edition of *Pandora's Box*, the WATL journal; the inaugural WATL student paper competition (the winner of which will present her or his paper at the second Women's Legal Breakfast); the formation of a working party on Curricular Reform; and coaching by women barristers for WATL members participating in the Law School moot competition.

Our activities may indicate the scope of our interests: we are concerned primarily with the position of women in the law. As law students this necessarily involves an analysis of the way the law is taught, so that curricular reform is one of our primary objectives. Contact WATL through Clubs and Societies, University of Queensland, St Lucia 4072 Ph 07) 377 2200 Fax 07) 377 2220.

## AUSTRALIAN FEMINIST LAW JOURNAL

The Australian Feminist Law Journal is a recently established journal which aims to provide a forum for women writers engaged in feminist analysis of legal issues.

The journal aims to demonstrate the relevance of feminist analysis to the practice and transformation of law, and to the related transformation of the practice and understanding of the social order.

Feminist analysis of the law encompasses a number of different disciplines, including philosophy, history, law, literary criticism, cultural studies, anthropology, sociology, psychology, and women's studies. This journal will be concerned with the substantive, theoretical and methodological achievements claimed by these disciplines for the light they throw on the nature of legal practice and the social characteristics and capacities of legal subjects. It will be concerned with the methodological foundations of these disciplines, in the belief that feminist analysis of legal practice is better able to contribute to a transformatory politics where a critical examination of the origins of current ideas and methods is maintained. It will also be concerned with empirical and experiential accounts of contemporary legal practice where the gendered, ethnic and disciplinary assumptions of the studies are explicitly included as matters of importance to the conclusions reached.

We invite the support and participation of women and men from the above disciplines and particularly encourage membership, subscriptions and contributions from people and groups not associated with formal institutions. Our subscription rates are as follows:

Waged: \$40.00

Concession: \$30.00

Institution: \$60.00

Overseas Institution: \$80.00

The journal is published twice yearly by THE AUSTRALIAN FEMINIST LAW FOUNDATION INC.; the latest volume was published at the end of August.

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